No. 6941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NGAI KWAN YING,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

The appellant is a Chinese female, who was born in China and who, upon her arrival in the Port of San Francisco on December 29, 1931, applied to the immigration authorities for admission to the United States under the status of a wife of a merchant. (*U. S. v. Mrs. Gue Lim,* 176 U. S. 459, 44 L. Ed. 544; *Cheung Sum Shee v. Nagle,* 268 U. S. 336, 69 L. Ed. 985.) A Board of Special Inquiry, which was convened at the port, decided that the appellant was not

the wife of her alleged merchant husband, Kwan Tow, but conceded that the latter was a merchant. (Tr. of R., pp. 16-26.) An appeal was taken to the Secretary of Labor with the result that the decision of the Board of Special Inquiry was affirmed. (Tr. of R., pp. 27-30.) Having been held in custody for deportation by the Commissioner of Immigration for the Port of San Francisco, a petition for a writ of habeas corpus was presented in behalf of the appellant in the Court below. (Tr. of R., pp. 1-15.) There were filed with the petition, as exhibits copies of the decisions of the Board of Special Inquiry and the Secretary of Labor. (Tr. of R., pp. 16-26 and pp. 27-30.) In opposition to the petition, counsel for the appellee, the respondent in the Court below, filed a memorandum of excerpts taken from the original immigration record. (Tr. of R., pp. 31-58.) From the denial of the petition, this appeal comes.

ISSUE IN THE CASE.

Kwan Tow, the alleged husband of the appellant, was first admitted to the United States in 1921, under the status of a minor son of a merchant. He, thereafter, made one trip to China, departing in January, 1931, and returning in December, 1931, in company with the appellant. (Tr. of R., p. 31.) He is said to have married the appellant at Ping Kai village, Far Yuen District, China, on April 6, 1931. The petition for a writ of habeas corpus contains a narrative of

his testimony and that of the appellant. (Tr. of R., pp. 4-10.)

The other witness for the appellant was a lady by the name of Au Yeung Shee, married and the mother of several children, who claims no relationship to either the appellant or the alleged husband. She was first admitted to the United States in 1920 and she was, thereafter, in China from December, 1930, to November, 1931. (Tr. of R., p. 31.) She claims to have attended the wedding of the appellant and her alleged husband. Her testimony was, also, narrated in the petition for a writ of habeas corpus. (Tr. of R., p. 10.)

In addition to the testimony of the appellant, her alleged husband, Kwan Tow, and the unrelated witness, Au Yeung Shee, there were introduced in evidence several documents, which consisted of the following:

1. A photograph, which was taken in China, showing the alleged husband and the appellant standing together, the latter in bridal costume. (This photograph has been mentioned by the Secretary of Labor in his decision.)

2. A marriage certificate, in the Chinese language, certifying to the marriage between the appellant and her alleged husband. (This certificate has been mentioned both in the petition for a writ of habeas corpus, Tr. of R., p. 11, and in the decision of the Secretary of Labor, the latter terming the document "a three-generation paper".)

3. A consular visa issued by the American Consul at Hongkong, China, to which there is attached the American Consul's report, as follows:

> "The applicant is proceeding to the United States as the wife of a lawfully domiciled treaty merchant, Kwan Tow (Too), who is the holder of a merchant's Return Permit No. 675-989, dated January 22, 1931, and who is connected with the Golden State Meat Market at 916 H Street, Modesto, California. The couple was married according to Chinese custom on April 6, 1931, and various witnesses have testified satisfactorily to this office as to the legality of the marriage." (This report has not been mentioned by the Secretary of Labor in his decision, although it is contained in the immigration files, which were before him, and which were in evidence at the hearing before the Board of Special Inquiry, original immigration record No. 807/428, second from last page.)

The issue raised by the petition for a writ of habeas corpus is whether or not the rejection of the appellant's testimony and evidence adduced before the Board of Special Inquiry and presented to the Secretary of Labor in support of her claim to be the wife of her alleged husband has been so arbitrary and unreasonable as to constitute a denial of a fair hearing.

Quock Hoy Ming et al. v. Nagle, 54 Fed. (2d) 875, at page 876, C. C. A. 9th.

Adverting to the grounds for the rejection of the appellant's testimony and evidence and, hence, for the

denial of the existence of the claimed relationship, we find that the Secretary of Labor made the following findings and decision:

> "This case comes on appeal from denial of admission as the wife of a Chinese merchant. The relationship is at issue.
>
> Board: Winings, Tetlow, McNeal, Ebey and Ward.
>
> Attorney Roger O'Donnell has been heard and filed a brief.
>
> The alleged husband who went to China in January, 1931, returned on the same ship with the applicant and an alleged acquaintance, who claims to have attended the applicant's wedding, have testified. The record shows such adverse features as the following:
>
> There are discrepancies in the testimony as to whether the applicant and her alleged husband went together or separately to visit her parents and between the applicant and both of her witnesses as to whether the identifying witness had her three children with her when they met in Hongkong. There is also inconsistency between the description of the alleged husband's home village as given in the present testimony and that which has heretofore been given by the alleged brothers of the alleged husband.
>
> However, the outstanding adverse feature in the case is the fact that the alleged husband's record shows him to be deserving of no credence as a witness and the record of the identifying witness indicates that she has small regard for the truth.

In 1923, the alleged husband and his alleged father appeared to testify on behalf of a woman and girl claimed by this alleged husband to be his mother and sister. This woman when confronted with her own previous record confessed that she was not the wife of this alleged husband's father nor the mother of the girl who accompanied her and admitted that she was identical with a woman who had previously been deported from the United States as a prostitute. This alleged husband unquestionably gave false testimony in connection with that application in 1923 and in the present case has repeated the false testimony with regard to his mother and sister.

The identifying witness in connection with her own application for admission as a returning laborer at San Francisco in November, 1931, appears to have made false statements regarding the disposal of the property upon which her laborer's return certificate had been issued.

A photograph of this applicant and her alleged husband taken in China and the so-called three generation papers frequently presented in those cases and have been placed in evidence. The photograph obviously does not prove that the persons pictured in it are husband and wife and it is to be noted that in the fraudulent case of the alleged husband's alleged mother's attempt to enter in 1923 similar three generation papers were presented.

In view particularly of the discrediting records of both of the applicant's witnesses, it is not believed that the evidence satisfactorily or reason-

ably establishes that she is the wife of her alleged husband.

It is, therefore, recommended that the appeal be dismissed.

W. W. Smelser,
Assistant to the Secretary."

(Tr. of R., pp. 27-30.)

ARGUMENT.

A FINDING OR DECISION BY ADMINISTRATIVE OFFICERS, IF NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS ARBITRARY AND BASELESS AND RENDERS THE HEARING UNFAIR; WHETHER OR NOT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE DECISION IS A QUESTION OF LAW REVIEWABLE BY THE COURT.

In support of the foregoing proposition, we believe that it will be sufficient to quote from the decision of the Supreme Court in *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431, at page 433, the following:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by

administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (Cases cited), or if the facts found do not, as a matter of law, support the order made (Cases cited).

* * *. But whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law,—are all matters within the scope of judicial power."

See, also:

Kwock Jan Fat v. White, 253 U. S. 455, 64 L. Ed. 1010, at page 1012;

Go Lun v. Nagle, 22 Fed. (2d) 246, C. C. A. 9th;

Gung Yow v. Nagle, 34 Fed. (2d) 848, C. C. A. 9th;

Hom Chung v. Nagle, 41 Fed. (2d) 126, C. C. A. 9th;

Young Len Gee v. Nagle, 53 Fed. (2d) 448, C. C. A. 9th.

IT WAS ARBITRARY AND UNFAIR TO THE APPELLANT TO USE TESTIMONY OF PERSONS GIVEN IN A PRIOR PROCEEDING, INVOLVING DIFFERENT PARTIES AND DIFFERENT ISSUES, AND, UPON THIS TESTIMONY, TO DISCREDIT HER ALLEGED HUSBAND.

It is urged by the Secretary of Labor that the appellant's alleged husband, Kwan Tow, testified falsely in 1923 in proceedings before the immigration authorities involving the applications for admission of a lady by the name of Wong Shee and a girl by the name of Quon Yit Gew and that, by reason of this false testimony, he is discredited as a witness for the appellant. It appears that in 1923 Wong Shee applied for admission as the wife of one Kwan Chong, who is the appellant's alleged husband's father, and that Quon Yit Gew applied for admission as the daughter of Kwan Chong. The appellant's alleged husband testified in the proceedings in 1923 that Wong Shee was his mother and that Quon Yit Gew was his sister. (Tr. of R., pp. 32-35.) Quon Yit Gew testified in 1923 that Kwan Chong, also known as Kwan Sung Jew, was her father, but, when confronted with this man, she identified him as her second brother, Kwan Tow (Too), and, when confronted with Kwan Tow, she was unable to identify him as any person whom she knew. (Tr. of R., pp. 38-39.) Wong Shee testified in 1923 that she was identical with a woman, who had been admitted in 1913 as the wife of one Yee Chung Sing and who was deported in 1918, that she was really not the wife of Kwan Chong and that Quon Yit Gew, who was then, also, applying for admission, was not her daughter. (Tr. of R., pp. 41-42.) Wong Shee and Quon Yit

Gew were deported, evidently upon the ground that they were not the wife and daughter, respectively, of the appellant's alleged husband's father, Kwan Chong. In the case of the appellant, the alleged husband repeated his testimony given in 1923 to the effect that Wong Shee was his mother and that Quon Yit Gew was his sister, adding that Wong Shee died in China on February 12, 1931, and that Quon Yit Gew was now living in the Straits Settlements. (Tr. of R., p. 35.) The statement of the examining inspector (Tr. of R., p. 38) that the appellant's alleged husband was in 1923 "furthering an attempt to import Chinese women to this country for immoral purposes" is entirely unsupported by any evidence.

It is, we concede, settled that the Courts will not pass upon the credibility of witnesses produced before the administrative officers, but will leave this question with the latter. However, the legal effect of evidence is a question of law and the Court will determine whether or not the administrative officers in discrediting the witnesses have acted fairly and reasonably.

In *Interstate Commerce Commission v. Louisville & N. R. Co.,* supra, the Supreme Court said:

> "* * * In a case like the present the courts will not review the Commission's conclusion of fact (Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S. 251, 55 L. Ed. 456, 31 Sup. Ct. Rep. 392) by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the

power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction.' 36 Stat. at L. 551, chap. 309.

* * * The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. Ed. 860, 24 Sup. Ct. Rep. 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its right or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding."

As the alleged husband testified in the appellant's case, in respect to Wong Shee and Quon Yit Gew, exactly, as he had testified in 1923 (Tr. of R., pp. 34-38), he could not be discredited upon the theory that

his own testimony was contradictory. His demeanor and manner, while testifying for the appellant, have not been assailed, he has never been convicted of any crime and his general reputation for truth and honesty has not been questioned. Therefore, it remains to be considered whether or not it is fair and just to the appellant to discredit her alleged husband upon the contradictory statements of Wong Shee and Quon Yit Gew made in 1923 in prior proceedings, involving different parties and different issues, it being necessarily conceded that the appellant was a total stranger to the prior proceedings and that the issue in those proceedings involved the question of whether or not Wong Shee and Quon Yit Gew were the mother and sister, respectively, of the appellant's alleged husband, whereas the issue in the case of the appellant was whether or not she was the wife of the alleged husband.

In *Fresh v. Gilson,* 10 L. Ed., 982, at page 984, the Supreme Court said:

> " * * * The principles, that the best evidence the nature of the case admits of must always be produced, and that a person shall not be affected by that which is *res inter alios acta,* are too familiar to require authorities to support them. We will mention, however, as applicable to these points, 3 Bac. Abr. 322. 1; 3 East 192; 2 Wash. 287; 5 Cranch 14; 1 Starkie's Ev. 58, 59. But familiar as these principles may be as rudiments of the law, *they are elements which enter essentially into the security of life, character, and property.* * * * "

In *Greenleaf on Evidence,* 16th Edition, Volume 1, Sec. 523, it is said:

> "It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be held bound."

In *Wigmore on Evidence,* 2nd Edition, Volume III, Sec. 1386, p. 63, it is said:

> "* * * Unless the issues were then the same as they are when the former statement is offered, the cross-examination would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposing inaccuracies and falsehoods. Unless, furthermore, the parties were the same in motive and interest, there is a similar inadequacy of opportunity, for the present opponent cannot be fairly required to abide by the possible omissions, negligence, or collusion of a different party, whose proper utilization of the opportunity he has no means of ascertaining."

And in the footnote to the foregoing, we find the following:

> "1767, Buller, J., Trials at Nisi Prius, 239: A deposition cannot be given in Evidence against any person that was not a party to the suit; and the reason is because he had not liberty to cross-examine the witness, and it is against natural justice that a man should be concluded by proof in a cause to which he was not a party."
>
> "In 1862, Hinman, C. J., in Law v. Brainerd, 30 Conn. 579: As that was a trial between differ-

> ent parties, having different rights and with whom the plaintiff had no privity, and as he has no opportunity to examine or cross-examine the witnesses, it would be contrary to the first principles of justice to bind or in any way affect his interests by the evidence given on that occasion."

In *Lee Choy v. U. S.,* 49 Fed. (2d) 24, C. C. A. 9th, this Court decided in favor of the proposition for which we contend, when it held that testimony of witnesses taken in a proceeding, to which the appellant was not a party, was inadmissible against him. At page 27, the Court said:

> "* * * In this case, the testimony of many of the witnesses referred to was taken in a nonjudicial proceeding to which appellant was not a party, and hence was inadmissible against him."

We, therefore, submit that it was entirely improper and unfair to the appellant to use in her case the testimony given in 1923 by Wong Shee and Quon Yit Gew, not only because it is a "rudiment of the law", but, also, because it is an "obvious principle of justice" that no person's rights shall be affected by evidence given in a prior proceeding, which involved different issues and different parties, "for the present party cannot be fairly required to abide by the possible omissions, negligence, or collusion of a different party".

Fresh v. Gilson, supra;
Greenleaf on Evidence, supra;
Wigmore on Evidence, supra.

Without the testimony given in 1923 by Wong Shee and Quon Yit Gew, there, of course, remains no basis for discrediting the appellant's alleged husband.

While it is appreciated that administrative officers are not bound by the strict rule of evidence applicable in suits at law, nevertheless, it must be conceded that these officers may not disregard fundamental rules based upon obvious principles of justice and reason.

Interstate Commerce Commission v. Louisville & N. R. Co., supra;

Kwock Jan Fat v. White, supra.

In the case of *Yee Doo Yen v. Tillinghast,* No. 4486-Civil, D. C. of Mass., unreported, the Court said:

> "Our legal rules of evidence, where they concern hearsay, rest, I believe, on accumulated experience. Judges and lawyers over many generations have found that statements such as were relied on here are unsafe to adopt. They appear to be an easy road to the truth; but really they are not safe to follow. It is settled that immigration tribunals are not bound by legal rules of evidence; but to reject the consistent, direct, detailed and unshaken testimony of three witnesses who appear and are cross-examined, on hearsay statements made by other persons in an independent proceeding where the issue involved in the present proceeding was not raised, seems to me to be arbitrary and unjustified."

U. S. ex rel. Ng Kee Wong v. Day, 44 Fed. (2d) 406, at page 407;

Flynn ex rel. Chin She Yin v. Tillinghast, 56 Fed. (2d) 317, C. C. A. 1st.

In practically all of the cases, in which the Courts have sanctioned the use of prior immigration records to discredit the applicant's principal witness, it will be found that the issue involved was whether or not the applicant was the son of an alleged father, who was usually conceded to be an American citizen.

Johnson v. Kock Shing, 3 Fed. (2d) 889, C. C. A. 1st;

Moy Said Ching v. Tillinghast, 21 Fed. (2d) 810, C. C. A. 1st;

Quan Wing Seung v. Nagle, 41 Fed. (2d) 58, C. C. A. 9th;

U. S. ex rel. Fong Lung Sing v. Day, 37 Fed. (2d) 36, C. C. A. 2nd;

Wong Foo Gwong v. Carr, 50 Fed. (2d) 360, C. C. A. 9th.

In such cases, the question of whether or not an applicant is the son of an alleged father largely depends upon the foundation which has been laid through the statements of the alleged father or of an alleged member of the family to the immigration authorities at various times throughout a long period of time as to the membership of the family. Manifestly, as long as an applicant, who seeks admission as the son of an alleged father, depends for his affirmative showing, as he does in every case, upon these prior recorded statements to establish his membership in a certain family, he has no ground for complaint if he or his alleged father or an alleged member of his family testifies in contradiction to the recorded statements and

if, by reason of the contradictory statements, it turns out that he is not a member of his alleged family. If for no other reason, these prior records would be admissible, in cases involving relationship between an applicant and his alleged father, upon the ground that the statements contained therein respect pedigree reputation and emanate from persons, who are not strangers to the applicant, but, who are identified by the applicant to be members of his alleged family.

In *Patterson v. Gaines et ux.,* 6 How. 550, 12 L. Ed. 553, at p. 573, the Supreme Court said:

> "* * * The complainants do not rely upon such proof to establish the fact that De Grange was a married man when he married Zuline. His declaration to Madame Benguerel associated with other facts sufficiently proves it.
>
> Before leaving this point, however, we will make a single remark upon what was said in the argument, that, if the record of De Grange's conviction had been produced, it would not have been competent testimony, from its being *res inter alios acta.*
>
> The general rule certainly is, that a person cannot be affected, much less concluded, by any evidence, decree, or judgment, to which he was not actually or in consideration of law, privy. But the general rule has been departed from so far as that wherever reputation would be admissible evidence, there a verdict between strangers, in a former action, is evidence also; such as in cases of manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigrees. * * *."

Hence, where the issue in a case involves the relationship of an applicant to his alleged father, it is not arbitrary or unfair for the immigration authorities to give effect to the prior records containing evidence as to the membership of the family and as to related matters to ascertain the pedigree reputation of the family and, thus, to determine whether or not the applicant is a member of the family. Such a case comes within the exception to the general rule that a person cannot be affected by evidence given in a prior proceeding to which he was not a party.

However, there is a great difference in a case, such as we have here, where the appellant's right to admission does not in any manner depend upon prior declarations as to family pedigree and history and where the prior declarations, which have been used to prejudice her right to admission, were made in an entirely unconnected proceeding by persons, who were total strangers to the appellant. The appellant was not married to her alleged husband until April 6, 1931, and in 1923, when the prior testimony, which is relied upon by the appellee, was given, she was not even acquainted with her alleged husband or with Wong Shee and Quon Yit Gew, the persons whom the alleged husband claimed as his mother and sister, respectively, or with any other person, who was a party to the proceeding in 1923. Furthermore, the appellant does not claim to have ever known her alleged husband's mother or sister, the evidence being that his mother, Wong Shee, died in February, 1931 (Tr. of R., p. 35), or about

two months prior to the marriage between the appellant and her alleged husband, and that his sister, Quon Yit Gew, has been living in the Straits Settlements since shortly after November 14, 1926. (Tr. of R., p. 35.)

In *U. S. ex rel. Ng Kee Wong v. Day,* 44 Fed. (2d) 406, supra, the Court, in distinguishing the cases of *Johnson v. Kock Shing,* supra, and *Moy Said Ching v. Tillinghast,* supra, at page 407, said:

> "* * * In any event, in those two cases the prior contradictory testimony had been given by the very person later claiming to be the father; a prior disclaimer of parenthood certainly stands on a different footing from the prior testimony of an ex-neighbor, long a resident of the United States, in the course of a proceeding to which the alleged father and son were not parties. * * *"

We anticipate that counsel for the appellee will rely chiefly upon the cases of *Quan Wing Seung v. Nagle,* supra, and *U. S. ex rel. Fong Lung Sing v. Day,* supra, but we submit that these cases are not in point.

In *Quan Wing Seung v. Nagle,* supra, the facts disclosed that the alleged father had testified in 1911 that he had no children; in 1925, he attempted to secure the admission of an alleged son, whom he claimed was born in 1906. The Court held that the alleged father's false testimony given in 1925, as to the birth of a son in 1906, justified the immigration authorities in discrediting him as a witness for the appellant, who applied for admission as his son in 1930. Obviously, the alleged father was discredited by his own contradictory statements as to the membership of his family

and, furthermore, the issue in the case of the alleged son, who applied for admission in 1925, was substantially the same as the issue in the case of the alleged son, who applied for admission in 1930, in that each case involved the question of the membership of the alleged father's family.

In the case at bar, the alleged husband has not been discredited by his own contradictory statements, as, indeed, he could not be, in that his testimony in the appellant's case, in respect to Wong Shee and Quon Yit Gew, is precisely, the same as his testimony given in 1923. (Tr. of R., pp. 32-38.) The alleged discrediting of his testimony arises from the testimony of third persons given in a prior proceeding. Furthermore, the issue in the cases of *Wong Shee* and *Quon Yit Gew* was entirely different than the issue in the case of the appellant. When Wong Shee and Quon Yit Gew applied for admission in 1923, the immigration authorities were called upon to decide whether or not they were the wife and daughter, respectively, of the appellant's alleged husband's father, Kwan Chong; in the case of the appellant, the immigration authorities were called upon to decide whether or not the appellant married her alleged husband in China on April 6, 1931.

In *U. S. ex rel. Fong Lung Sing v. Day,* supra, the distinctions, as pointed out in *Quan Wing Seung v. Nagle,* supra, are applicable, in that in that case the alleged father was also discredited by his own contradictory statements made in prior proceedings involving substantially the same issue, namely, the number of sons that he had.

In *Gung You v. Nagle,* 34 Fed. (2d) 848, at page 852, this Court said:

> "* * * The method of ascertaining the credibility of a witness has been known to the law for centuries, and our juries, when called upon to pass upon testimony, are fully instructed thereon. Aside from the appearance of the witness, his demeanor on the stand, and the reasonableness of his testimony, and his character, as determined by his manner of testifying or by evidence of a good or bad reputation, he can only be impeached by evidence of contradictory statements made out of court or in court on *material* matters. This is the law's method of measuring the credibility of witnesses."

In *Crocker First Federal Trust Co. v. U. S.,* 38 Fed. (2d) 545, C. C. A. 9th, at page 547, the Court said:

> "* * * Moreover the offer was to impeach the witness and a witness cannot be impeached upon an immaterial or collateral matter, particularly when it is first brought on cross-examination. 40 Cyc. 2769. * * There was no claim here of that broad right of cross-examination but the narrower right of impeachment. In the exercise of that discretion, the trial court could and should consider the rule that evidence tending to degrade a witness unnecessarily should be excluded. * * *"

Also, in *Cvitkovic et al. v. U. S.,* 41 Fed. (2d) 682, C. C. A. 9th, at page 684, the Court said:

> "To bring a case within the maxim, *falsus in uno, falsus in omnibus,* there must be conscious falsehood, and the falsehood must be upon a material point. Wigmore on Evidence (2nd Ed.) Sections 1013, 1014. * * *"

Obviously, the question of whether or not the appellant is the wife of her alleged husband through a marriage occurring in China on April 6, 1931, has not even a remote bearing upon the question of whether or not Wong Shee and Quon Yit Gew, the persons, who applied for admission in 1923, are the mother and sister, respectively, of the appellant's alleged husband.

In the following cases, it has been held that inconsistent testimony contained in prior immigration records, as to immaterial and collateral issues, does not "discredit the texture of the rest of the testimony" as to the material issue in the case.

Louie Poy Hok v. Nagle, 48 Fed. (2d) 753, C. C. A. 9th;

Flynn ex rel. Chin She Yin v. Tillinghast, 56 Fed. (2d) 317, C. C. A. 1st, supra;

Jew Yut Chew v. Tillinghast, 25 Fed. (2d) 886, D. C.;

Moy Fong v. Tillinghast, 33 Fed. (2d) 125 D. C.;

Yee Doo Yen v. Tillinghast, supra;

U. S. ex rel. Ng Kee Wong v. Day, supra.

IN DISCREDITING THE APPELLANT'S ALLEGED HUSBAND, UPON THE BASIS OF HIS ALLEGED FALSE TESTIMONY GIVEN IN 1923, THE IMMIGRATION AUTHORITIES HAVE ACTED INCONSISTENTLY, UNREASONABLY AND UNFAIRLY.

The appellant's right to admission depended upon the ascertainment by the immigration authorities of two material facts, namely, (1) that her alleged hus-

band was a domiciled merchant and (2) that she was the wife of her alleged husband. As to the first subject of inquiry, it is important to observe that the Board of Special Inquiry expressly conceded that the alleged husband was a domiciled merchant, the finding being as follows:

> "By Chairman:
>
> The applicant Ngai Kwan Ying, seeks admission as the lawful wife of Kwan Tow, an alleged domiciled merchant of Modesto, California, whose status as such was conceded by this service when Form 632 was granted him January 22, 1931. Although, in my opinion, there is evidence strongly indicative that the original admission of this Chinese was secured through fraud, I believe, in view of the department's action in May, 1931, in sustaining the appeal of an alleged brother, Kwan Moon, in whose case the same feature was at issue, that the board should concede the exempt status of the alleged husband in the present matter. * * *"

However, the alleged husband could not be a domiciled merchant, unless his original admission in 1921, as the minor son of his alleged merchant father, Kwan Chong, was lawful.

> *Wong Mon Lun v. Nagle,* 39 Fed. (2d) 844, C. C. A. 9th.

Hence, the concession that the alleged husband was a domiciled merchant necessarily embodied the concession that he was, in fact, the son of Kwan Chong, the person under whose status he was originally admitted.

We, therefore, have the situation where the immigration authorities, in the case of the appellant, have effectively credited the alleged husband's claim to be the son of his alleged father, Kwan Chong, upon which claim the legality of his domicile and his right to be a merchant necessarily depend, yet, they have discredited him when he claims to be the husband of the appellant, although in each instance they had before them and fully considered the testimony given in 1923 by the alleged husband and the then applicants, Wong Shee and Quon Yit Gew, whom he allegedly falsely claimed to be his mother and sister, respectively. Such action is manifestly inconsistent and, we submit, unreasonable and unfair, especially inasmuch as the alleged false testimony given in 1923 was infinitely more material and relevant to the question of the alleged husband's relationship and identity as the son of his alleged father than it was to the question of whether or not he was the husband of the appellant. In other words, it appears unreasonable and unfair for the immigration authorities to hold that the alleged false testimony given in 1923 rendered the alleged husband unworthy of belief, insofar as the appellant's rights were concerned and, at the same time, to hold that he is worthy of belief insofar as his own rights were involved.

In the case of *Wong Dock v. Nagle,* 41 Fed. (2d) 476, it was held that the immigration authorities, after considering and conceding the marital status of the alleged father in the case of a son, who applied for admission in 1909 and in the case of another son, who

applied for admission in 1924, that it was unreasonable and unfair to deny that the marital status of the alleged father in the case of his third son who applied for admission in 1930, when the evidence was identical in all three cases. At page 477, the Court, through His Honor Judge Wilbur, said:

> "It must be conceded that it would be unreasonable and unfair for the immigration authorities, after fully investigating the discrepancy between the statement of the alleged father in 1897, when he stated that he was unmarried and his later statement made in 1909 in an effort to secure the entry of his son Wong Woon, and having determined that Wong Woon was the legitimate son of the marriage of the father and Hom Shee, and after having reached a similar conclusion in 1924 on the admission of Wong Cheng, an alleged brother, to turn about and on the same evidence and without any additional circumstances to hold that no such marriage occurred, and for that reason deny admission to the alleged second son, * * *."

THE ALLEGED DISCREDITING OF THE APPELLANT'S UNRELATED WITNESS, AU YEUNG SHEE, WAS ARBITRARY AND UNFAIR.

The unrelated witness, Au Yeung Shee, claims to have attended the ceremony incident to the marriage between the appellant and her alleged husband. (Tr. of R., p. 10.) However, it appears that in November, 1931, this lady returned to the United States from

a trip to China and that, as evidence of her right to admission, she presented a so-called laborer's return certificate. This certificate had been issued to Au Yeung Shee, prior to her departure for China in December, 1930, upon a showing that she had property in the United States to the amount of $1,000, 8 U. S. C. A., Sec. 276, the same consisting of cash in bank, and the immigration authorities took the position that she could not return to the United States, unless the money had remained intact in bank during her sojourn abroad. In line with this position, an investigation was conducted and, as a result, it was found that she had borrowed $800.00 from the bank, using her deposit of $1,000.00 as security. When questioned, Au Yeung Shee stated that she had not borrowed any money from the bank. (Tr. of R., pp. 43-46.) For the reason that it is said that Au Yeung Shee gave false testimony as to her bank account, in a proceeding involving her own application for admission and in which the appellant was in nowise concerned, it is concluded that she is not to be believed when she testifies, as a witness for the appellant, that she attended the wedding of the appellant and her alleged husband in China in April, 1931.

We submit that the matter of Au Yeung Shee's transactions with the bank is entirely too remote to the issue involved in the case at bar to justify the discrediting of her testimony in behalf of the appellant. Obviously, there is no conceivable connection between the fact of her attendance at the marriage of the appellant and the fact that she borrowed money from

the bank. To discredit this witness upon such a wholly immaterial matter is arbitrary and unfair under the authority of all of the decided cases.

Crocker First Federal Trust Co. v. U. S., supra;
Cvitkovic et al. v. U. S., supra;
Louie Poy Hok v. Nagle, supra;
Flynn ex rel. Chin She Yin v. Tillinghast, supra;
Jew Yut Chew v. Tillinghast, supra;
Moy Fong v. Tillinghast, supra;
Gung Yow v. Nagle, supra.

Moreover, a reading of the testimony of Au Yeung Shee, which was given at the time of her application for admission, in respect to her bank account, leaves considerable doubt as to whether or not she did consciously testify falsely (Tr. of R., pp. 43-46), it appearing that her alleged husband, Leong Poy, actually handled the transaction at the bank and that she knew little or nothing concerning it. However, the fact remains that Au Yeung Shee was finally admitted to the United States as the result of an appeal taken to the Secretary of Labor from the excluding decision of the Board of Special Inquiry. (Immigration record No. 31038/2-1.) Thus, it was effectively conceded that either Au Yeung Shee did not give false testimony or that the question of whether or not she had borrowed money from the bank was immaterial to her right to admission. Manifestly, if the matter were immaterial to her own application for admission, it

must be even less material to the application for admission of the appellant.

THE IMMIGRATION AUTHORITIES HAVE ARBITRARILY AND UNFAIRLY REJECTED THE AFFIRMATIVE EVIDENCE ESTABLISHING THAT THE APPELLANT WAS THE WIFE OF HER ALLEGED HUSBAND.

As between the appellant and her alleged husband, the Secretary of Labor, in his decision, supra, concedes that there is only one discrepancy and this has reference to whether the appellant and her alleged husband went together or separately to visit her parents, who resided at a village about 3 miles distant from the alleged husband's village. The appellant's testimony is that she and her husband walked the distance, both ways, together, whereas the alleged husband testified that both in going and returning he was preceded by his wife, both the appellant and the alleged husband, however, agreeing that the trip was made on November 14, 1931, and the appellant adding that the occasion was the betrothal of her brother. (Tr. of R., pp. 52-53.) Inasmuch as the exact distance, which may have separated the two and the time that may have elapsed between the time of the arrival of the appellant and the alleged husband were not made the subjects of inquiry, it cannot be said that any substantial discrepancy exists.

In *Wong Hai Sing v. Nagle,* 47 Fed. (2d) 1021, C. C. A. 9th, at page 1022, the Court said:

> "The courts have held that in long and involved cross-examination of several persons covering the

> minutiae of daily life, discrepancies are bound to develop and are inconclusive with regard to the testimony as a whole when they are on minor points. There are many discrepancies of that nature in the case here presented, details which of themselves would not be sufficient to justify the exclusion order of the Board: the exact hour and length of time of the first visit of Wong Hai Sing to the home of his alleged wife; whether or not the bride's house was rented or had been in her family for several generations; whether the mother of Wong Ho Shee had bound or unbound feet; whether the mother or the daughter was taller; and the exact time when the appellant made presents of jewelry to Wong Ho Shee. These are details upon which people might err very easily, and do not per se prove a deliberate attempt at falsification."

We, therefore, have the uncontradicted testimony of the appellant and her alleged husband as to the fact of marriage, the events contemporaneous therewith, their subsequent cohabitation as man and wife in the alleged husband's home at Ping Kai village, visits to Canton City, the journey from the home village to the United States, relatives on both sides of the family and as to all of the other countless matters concerning which they were questioned. (Tr. of R., pp. 4-10.) Such testimonial agreement could not reasonably be expected to appear unless the claim of relationship was genuine.

Hom Chung v. Nagle, 41 Fed. (2d) 126, C. C. A. 9th;

Young Len Gee v. Nagle, 53 Fed. (2d) 448, C. C. A. 9th.

Although the immigration authorities have held, erroneously, as we have endeavored to point out, that the alleged husband, as well as the unrelated witness, Au Yeung Shee, are discredited, nevertheless, there remains the direct and positive testimony, reasonable and probable, uncontradicted by any fact or circumstance, of the appellant, herself. Moreover, the Secretary of Labor does not assign any reason for the rejection of the appellant's testimony, but we assume that it may be contended that it is not entitled to full credit for the reason that the appellant is an interested party.

In *U. S. ex rel. Basile v. Curran,* 298 Fed. 951, D. C., Judge Hand said:

> "* * * It is not enough for the Board of Special Inquiry to say that they do not believe that the certificate was retained by the counsel, in the face of his jurat, or that it was false, when they had not seen it. They have no power to dispense with the usual means of ascertaining the truth. They are as much bound to proceed rationally as I am, and it is not rational procedure to disregard evidence inherently probative for no assignable reasons. * * * "

In *Quock Ting v. U. S.,* 140 U. S. 417, 11 Sup. Ct. 733, 35 L. Ed. 501, at page 502, the Supreme Court said:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by

anyone, should control the decision of the court; * * *."

In *Chin Hing v. U. S.*, 24 Fed. (2d) 523, C. C. A. 5th, at page 524, the Court said:

> "We are of opinion that appellant fairly met the burden that was on him to prove that he is a citizen of the United States. There is nothing inherently improbable or unreasonable in the testimony submitted to sustain his claim of citizenship. He was corroborated by two witnesses, who were in position to know the facts, and by the circumstance that he was able to read and speak the English language. The testimony of the two white witnesses is of little weight, especially since the District Judge did not have them before him. Even if their testimony could be held sufficient to discredit Chin Bing, the testimony of appellant and his uncle still remains unimpeached. It is only by arbitrarily rejecting the uncontradicted testimony that the order of deportation can be sustained.
>
> The same fairness and impartiality should govern in considering and weighing the testimony of persons of Chinese descent who claim to be citizens of this country as are given to the testimony of any other class of witnesses. Kwock Jan Fat v. White, 253 U. S. 454, 40 S. Ct. 566, 64 L. Ed. 1010; Yee Chung v. United States (C. C. A.) 243 F. 126. The case was not capable of any better proof than was made. We are of opinion that it satisfactorily was made to appear that appellant is a citizen of the United States."

In *Woey Ho v. U. S.,* 109 Fed. 888, C. C. A. 9th, it is said:

> "A court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All people, without regard to their race, color, creed or country, whether rich or poor stand equal before the law. It is the duty of the Courts to exercise their best judgment, not their will, whim or caprice, upon the credibility of every witness. * * *."

Yee Chung v. U. S., 243 Fed. 126, C. C. A. 9th.

> "Suspicion should not control uncontradicted evidence."

Becker v. Miller, 7 Fed. (2d) 293, C. C. A. 2nd; *Sturtevant v. U. S.,* 36 Fed. (2d) 562, C. C. A. 9th.

As to the rule of evidence in respect to the effect to be accorded uncontradicted testimony of an unimpeached witness, although an interested party, we refer to the recent decision of the Supreme Court in *Chesapeake & O. Ry. Co. v. Martin,* 283 U. S. 209, 51 Sup. Ct. 453, wherein it was held that the testimony of a witness, which was reasonable and probable, uncontradicted and candid, could not be rejected merely upon the ground that the witness was the agent of his principal and, therefore, an interested party. We take the liberty to quote at length from the decision, as follows:

"At the conclusion of respondents' case in rebuttal, petitioner demurred to the evidence upon the ground that the action was barred by the provision of the bill of lading requiring claims for loss or damage in case of failure to make delivery to be made 'within six months after a reasonable time for delivery has elapsed.' The demurrer was overruled and judgment entered against petitioner upon verdict for the sum of $1684.39. The trial court said that the testimony of the freight agent was no part of the plaintiffs' case; that the misdelivery was made through his office; that, although unimpeached, the jury would not be bound to accept the evidence of the agent as conclusive; and, consequently, that the court was obliged to disregard it and overrule the demurrer to the evidence. * * *

A demurrer to the evidence must be tested by the same rules that apply in respect of a motion to direct a verdict. (Cases cited) In ruling upon either, the court must resolve all conflicts in the evidence against the defendant; but is bound to sustain the demurrer or grant the motion, as the case may be, whenever the facts established and the conclusions which they reasonably justify are legally insufficient to serve as the foundation for the verdict in favor of the plaintiff. (Cases cited) And in the consideration of the question, the court, as will be shown, is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying countervailing inferences or suggesting

doubt as to the truth of his statement, unless the evidence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable. * * *

We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of opinion that this was not enough to take the question to the jury, and that the court should have so held.

It is true that numerous expressions are to be found in the decisions to the effect that the credibility of an interested witness always must be submitted to the jury, and that that body is at liberty to reject his testimony upon the sole ground of his interest. But these broad generali-

> zations cannot be accepted without qualification. Such a variety of differing facts, however, is disclosed by the cases that no useful purpose would be served by an attempt to review them. In many, if not most, of them, there were circumstances tending to cast suspicion upon the testimony or upon the witness, apart from the fact that he was interested. We have been unable to find any decision enforcing such a rule where the facts and circumstances were comparable to those here disclosed. Applied to such facts and circumstances, the rule, by the clear weight of authority, is definitely to the contrary. (Cases cited.)"

The Supreme Court supported its decision by abundant citations and quotations.

The several cases, *Weeding v. Ng Bin Fong,* 24 Fed. (2d) 821, C. C. A. 9th; *Quan Wing Seung v. Nagle,* 41 Fed. (2d) 58, C. C. A. 9th; *Wong Fat Shuen v. Nagle,* 7 Fed. (2d) 611, C. C. A. 9th, wherein the Court has held that the immigration authorities were not bound to believe an applicant, disclose that "there were circumstances tending to cast suspicion upon the testimony or upon the witness, apart from the fact that he was interested".

However, the testimony of the appellant does not stand alone and it does not lack corroboration. Although assuming, *arguendo,* that her alleged husband gave false testimony in 1923, in respect to his mother and sister, and that the unrelated witness, Au Yeung Shee, gave false testimony in November, 1931, when she was

an applicant for admission, in respect to having borrowed money from the bank, nevertheless, as we have endeavored to point out, these matters are entirely immaterial to the question of whether or not the appellant is the wife of her alleged husband and, hence, it would be unfair and unreasonable to discredit their testimony as to this material question.

In *Louie Poy Hok v. Nagle,* 48 Fed. (2d) 753, at page 755, this Court said:

> "It is true that the testimony of Louie Fung On with regard to the date of his alleged brother's birth does not accord with the statements of others, but it does not for that reason discredit the texture of the rest of the testimony. * * *"

Yee Doo Yen v. Tillinghast, No. 4486-Civil, D. C. of Mass., supra;

Flynn ex rel. Chin She Yin v. Tillinghast, 56 Fed. (2d) 317, C. C. A. 1st, supra;

Jew Yut Chew v. Tillinghast, 25 Fed. (2d) 886, D. C., supra;

Moy Fong v. Tillinghast, 33 Fed. (2d) 125, D. C., supra;

U. S. ex rel. Ng Kee Wong v. Day, 44 Fed. (2d) 406, D. C., supra.

But, entirely aside from the coroboration, which came from the appellant's alleged husband and the unrelated witness, Au Yeung Shee, the appellant's testimony was corroborated by certain documents, which the immigration authorities arbitrarily ignored. First,

as alleged in the petition for a writ of habeas corpus (Tr. of R., p. 11), there was a marriage certificate disclosing that the appellant and her alleged husband were married. This document is mentioned by the Secretary of Labor in his decision, supra, as a "three generation paper" and the Secretary of Labor disposes of this material evidence by stating "that in the fraudulent case of the alleged husband's alleged mother's attempt to enter in 1923 similar three-generation papers were presented". (Tr. of R., p. 29.) Wherein the similarity obtains the Secretary of Labor does not specify, as, indeed, he could not, in that the documents were in the Chinese language and no translation was ever made. In any event, although the documents may have been similar to those presented in 1923 by the appellant's husband's alleged mother, nevertheless, it is hardly fair or reasonable to the appellant to hold that the particular documents, which she presented, were fraudulent. Citation of authority is hardly necessary to show that a certificate of marriage constitutes important evidence as to the fact of marriage.

The other document, which was ignored, consisted in a report by the American Consul, as follows:

> "The applicant is proceeding to the United States as the wife of a lawfully domiciled treaty merchant, Kwan Tow (Too), who is the holder of a merchant's Return Permit No. 675989, dated January 22, 1931, and who is connected with the Golden State Meat Market at 916 H Street, Modesto, California. The couple was married according to Chinese custom on April 6, 1931, and

various witnesses have testified satisfactorily to this office as to the legality of the marriage."

(Original Immigration Record No. 807/428, second from last page.)

Under Section 2 of the Immigration Act of 1924, 8 U. S. C. A., Sec. 202, it is the function of consular officers to issue immigration visas to aliens, who are about to proceed to the United States and it is expressly provided that no immigration visa shall be issued "if the consular officer knows or has reason to believe that the immigrant is inadmissible to the United States under the immigration laws". Thus, in accordance with his statutory duty, the American Consul, in order to ascertain that the appellant was eligible for admission to the United States, caused an investigation to be made and procured the testimony of witnesses in China as to the existence of the relationship between the appellant and her alleged husband. His report to the effect that his investigation, as the result of having obtained the testimony of witnesses, established the existence of the relationship is something more than a mere statement of claim as to the status under which the appellant would be admissible to the United States. It is the statement of the ascertainment of a fact by a coordinate officer of the government in pursuance of official duty.

While we do not claim that the immigration authorities were in any manner bound to accept the consular report as conclusive upon the question of whether or

not the appellant is the wife of her alleged husband, nevertheless, we submit that the report furnished some evidence to corroborate the appellant's claim.

The Courts have time and time again sanctioned the use as evidence by immigration authorities of letters and cablegrams from consular officers, as well as reports and affidavits, both official and unofficial.

Li Bing Sun v. Nagle, 56 Fed. (2d) 1000, C. C. A. 9th;

White v. Backus, 213 Fed. 768, C. C. A. 9th;

U. S. v. Uhl, 215 Fed. 573, C. C. A. 9th;

Healy v. Backus, 221 Fed. 358, C. C. A. 9th;

Choy Gum v. Backus, 223 Fed. 487, C. C. A. 9th.

Moreover, inasmuch as the report disclosed that the consul had in his possession the evidence, upon which the report was based, the immigration authorities could not ignore the report, until they had, at least, secured the evidence from the consul and reviewed it.

U. S. ex rel. Schachter v. Curran, 4 Fed. (2d) 356, C. C. A. 3rd.

CONCLUSION.

In view of the foregoing considerations, we submit that the denial of the claim of the appellant to be the wife of her alleged husband has been so arbitrary and unfair as to constitute a denial of a fair hearing.

It is respectfully asked that the order of the Court below be reversed, with directions to issue a writ of habeas corpus as prayed for.

Dated this 10th day of November, 1932.

Respectfully submitted,

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